

Proposed Leg.

OGC 78-1498

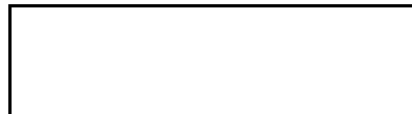
10 March 1978

OGC 78-0394/2

MEMORANDUM FOR: Office of Legislative Counsel

ATTENTION :

FROM :



Assistant General Counsel

SUBJECT : S. 2525 - Proposed Intelligence Charter Legislation -
Title IV - CIA- Issues Paper

1. Discussed below are comments concerning your 23 February draft issues paper on Title IV of the proposed intelligence charter legislation and several additional issues suggested for inclusion.

2. "Propriety" in 403(b) should be defined to mean "a sole proprietorship, partnership, corporation, holding company, or other entity, or an interrelated group of entities formed for the accomplishment of a particular intelligence objective, owned or controlled by the Central Intelligence Agency." This would allow the operation of "proprietary projects" within the limitations of Section 421(d). If the last clause of the existing definition is retained, it should be modified to read "... but whose relationship with the Central Intelligence Agency is not officially acknowledged" to accommodate your item no. 3 "publicly known" proprietaries.

3. The second sentence of Section 411 should be modified to read: "The Agency shall be an independent establishment under the direction of the National Security Council." This would clarify the relationship between CIA, the NSC, and the Executive Office of the President and deal with your item no. 2.

4. Section 412(a), and the interplay between the two "Directors," would be clarified were the position of head of CIA redesignated as the "Administrator of the Central Intelligence Agency." Then all references in Title IV to the "Director" of the Agency would refer instead to the "Administrator" and there would be only one Director, the Director of National Intelligence. The second sentence of 412(a) should read: "The Director of National Intelligence, or the Deputy Director or an Assistant Director as designated by the DNI to be responsible for the management of the Agency, or by the President in accordance with Section 117, shall act as Administrator." There should be an additional sentence providing that: "The

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Administrator shall designate from among the senior officials of the Agency which official shall act as the Administrator during any temporary absence, disability, or vacancy in the office of the Administrator." These changes should clarify your items nos. 4 and 5.

5. Section 413(b)(1) should be modified to allow collection "... from any person willing openly or voluntarily, with or without compensation, to provide such intelligence." The alternative you describe in your item no. 6, i.e., using 1-801 from E.O. 12036, would be a desirable alternative.

6. 413(b)(2) also should be modified to read "... or from a person willing openly or voluntarily, with or without compensation,..." Further, "integrally and exclusively" should be deleted to avoid the obvious problems which would result, as should the word "foreign" before "persons within the U.S.," to allow, for instance, the Agency to utilize the authorities in Section 219, and the other provisions of Title II which authorize collection of information concerning U.S. persons. This treats your item no. 7.

7. Section 413(b)(3) should read "develop, conduct, and provide support, including necessary testing for technical ..." to allow the Agency clear authority to conduct such programs, and to accomplish required testing, in the U.S.

8. I do not understand the DDO's reluctance to assume responsibility under 413(f) for the coordination of counterterrorism activities. The Agency itself need only engage in the first two parts of the definition of such activities in 104(7)(A) and (B), i.e., the collection, retention, processing, analysis and dissemination of information, and coordination, and may avoid offensive protective measures if it chooses. Some U.S. Government entity must coordinate these actions to avoid a [] type debacle involving two U.S. entities. Coordination is the DNI's responsibility and there is no organization other than CIA with the presence and resources to do the job. A clause should be added to authorize coordination of IC activities with similar activities of non-IC entities. In response to your item 9, I see no problem with using the "agent of the DNI" format. The phrases "including collection utilizing human sources" and "by any other entity of the intelligence community" should be deleted.

9. 413(g)(3) should include also after the reference to the DNI "... and act as the agent of the DNI in coordinating all such liaison by any other entity of the intelligence community." This is your item no. 11.

10. Concerning your item no. 10, since the DNI will be responsible under Title I for determining which agencies should perform which services, 413(g)(2) seems appropriate. 1-809 of E.O. 12036 reflects the mandate of the National Security Act which, of course, will no longer exist.

11. 413(g)(1) should be limited by inserting "clandestine" before "collection of intelligence...." This is your item no. 14. The reference to the AG should be deleted from the beginning of 413(h)(2) and a corresponding change to "as are deemed appropriate" should be made further on in the section. The AG might be reinserted as a recipient of the DNI's recommendations, after the President and the NSC. This is your item no. 15.

12. Regarding your item nos. 12 and 13, the concept of an independent Office of the DNI appears to be gaining momentum as is reflected in E.O. 12036 as well as this bill. So long as this division of responsibility is in accordance with the DCI's thinking in this regard, and so long as the relationship between CIA, ODNI, DNI and D(Administrator) CIA, is made more clear, I cannot see any real problem with it. The language of 413(g)(5) adds "audit services" to the scope of 1-813 of E.O. 12036 and should be sufficiently broad. However, "security" could be added after "legislative" to remove any ambiguity as to whether it is "administrative support."

13. Concerning your item no. 16, the insertion of a catch-all provision in 413 similar to 1-812 of E.O. 12036 is a good idea. However, the limitation to "§413 above" should be replaced by "in this Title."

14. Your item no. 17 description of 421(a)(1) as unduly burdensome is more than accurate.

15. 421(a)(3) should include "detailed" after "assigned" since these are "terms of art" in the personnel world.

16. 421(a)(5) should include "acquire and clear necessary land;" after "(40 U.S.C. 278a);" and "including bachelor and family housing outside the U.S." after "(40 U.S.C. 601-615)" but before the semicolon.

17. 421(a)(6) should be revised substantially, in line with your item no. 18 and 423(1), to read:

(6) conduct background and security investigations of applicants for employment and employees, and their spouses or intended spouses, contractors, and employees of contractors, and persons with similar associations, with both the Agency and the Office of the Director;

18. 421(a)(7) should be modified by adding "and the Office of the DNI" after "Agency operations."

19. 421(a)(8) could be broadened by deleting "and" and inserting "and other administrative" between "legislative" and "services." This is your item no. 19.

20. [redacted] and other persons, and activities, associated with the Agency and the Office of the DNI." 621(a)(12) allows NSA to provide cover for "activities" and the remainder of the additional language reflects CIA's other covert relationships and responsibilities.

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21. If the word "business" remains part of the "proprietary" definition in 403(b), the phrase "and other entities" should be inserted after "proprietaries" in 421(a)(10) to authorize the Agency's noncommercial proprietaries.

22. 421(a)(11) should simply authorize the Agency to "protect intelligence sources and methods."

23. There should be added at the end of 421(a)(14) "and transport in such equipment, to and from school, children of personnel who have quarters for themselves and their families at isolated stations where adequate public transportation is not available;" and this entire section should apply to the office of the DNI as well as the Agency. [redacted]

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24. 421(a)(15) should have added at the very end ", as amended" or the Agency will be saddled with the existing statute forever.

25. The point raised in your item no. 20 regarding "association and library dues" is already covered in 422(a). However, 421(a)(16) might be amended by adding ", or membership in," after "at meetings of" and "or membership" after "such attendance" to authorize the Agency to pay professional dues in other areas as well, where necessary.

26. Your item no. 21 proposes a very necessary additional subsection 421(a)(18).

27. There should also be a 421(a)(19) as follows:

accept in the name of the Agency, and employ or dispose of in furtherance of its functions, any money or property, real or personal, received by gift, devise, bequest or otherwise.

This is derived from 42 U.S.C. 5042 which grants similar authority to ACTION.

28. 421(c) should be expanded by inserting "detail" between "to assign" and "or loan." The second and third references in the first sentence to "the Agency" could be deleted, and there should be added at the end of that sentence, "and the Agency may similarly assign, detail, or loan personnel to other departments and agencies, in accordance with this Act."

29. If the proposed changes to the "proprietary" definition in 403 are not accepted, 421(d)(1) should be revised to delete "normal" and to provide that such excess funds may be used where deemed necessary by the Administrator of CIA to form and operate additional or successor proprietaries in furtherance of the same or similar operational requirements or purposes. This is your item no. 22.

30. The Attorney General has no proper role to play in 421(d)(2), especially since the Comptroller General is to receive reports of liquidations. The net value should be raised, say to \$100,000, and the last sentence should be modified to allow for non-disclosure of identities, operational details, etc., and to allow the proceeds to be utilized for the formation or sustenance of other proprietaries with the same or similar purposes, perhaps on a certification by the Administrator to the Comptroller of necessity.

31. 421(e) should be expanded to apply to all the foregoing subsections, or even better, to the entire Title.

32. Your item no. 23 is well taken.

33. There should be added to 421(h), after "appoint," the phrase "or contract for" to allow arrangements with security organizations where necessary. Also, the "Office of the DNI" should be inserted after "grounds of the Agency." The question has arisen whether this subsection is intended to imply firearms authority for these purposes, but the suggested changes to 421(i) should clear up this ambiguity.

STAT 34. As you know, I believe, has worked out roughly the following language for 421(i):

Under regulations prescribed by the Administrator, Agency personnel may carry and use firearms in the discharge of their official duties: Provided, That within the U. S., such duties should include only the transportation and use of firearms for authorized training purposes, and the protection of (i) information concerning intelligence sources and methods, and classified intelligence materials; (ii) facilities, properties, monies and other items of value owned or utilized by the Agency or the Office of the DNI; (iii) the DNI, the DDNI, any Assistant DNI, and other personnel of the Agency or the Office as may be designated by the Administrator. any such designation to be made only on a determination that a specific exigency warrants such protection and on the condition that the designation, unless similarly renewed, shall terminate upon cessation of the exigency, or within 120 days or some other stated period,

whichever may be sooner; and (iv) defectors and foreign persons visiting the U. S. under Agency auspices.

This is your item no. 24.

35. 421(j)(1) should be amended by adding "including, but not limited to those" before "governing." There should be an additional phrase at the end of the subsection to the effect that "and all staff positions of the Agency and all incumbents of those positions shall be in the excepted service." This is derived from the FBI authority at 28 U.S.C. 536. This is your item no. 25.

36. Regarding 421(j)(4), I think the last clause should be modified to refer to service "in the excepted service continuously for at least one year...." This would allow reliance on some period of service with the Office of the DNI, for example, to reach the one-year mark.

37. 422(a) should be modified to include "use and dispose of" after "procure" in the first sentence regardless of the fate of your item no. 21. The first sentence should end with "including, as deemed necessary or advisable by the Administrator in furtherance of the Agency's functions and in accordance with all applicable laws, accommodation procurement activities." This is your item no. 26.

38. I am told that 422(b) should somehow conform to S. 1264 rather than the existing provisions of Title 10, U.S.C. In any event, "services" should be added between the first reference to "property" and "and research." Also, the citation should be to "section 2303(a) of Chapter 137 of Title 10...."

39. 422(c) should include "use and dispose of" after "procure" and "or for accommodation procurement" after "intelligence community."

40. Since 139 is a restriction on the Agency, there is no way to avoid its effects as per your item no. 27.

41. There should be a new section headed "PRINTING AND BINDING" and numbered 423 (with necessary renumbering of subsequent sections) patterned on section 623 of the NSA charter.

The Agency is authorized to maintain and operate a full-scale printing plant for the production of intelligence and intelligence-related materials, without regard to any other provisions of law.

42. For conformity, 423(1) should include "and employees, and their spouses and intended spouses," after "employment with the Agency."

43. 423(2) should be modified to include "and receive" after "to provide" and "or from" before "any other entity" and to substitute "under regulations established by the Administrator, other services of" for "under exigent circumstances." This is your item no. 28.

44. If the change suggested for 423(6) is accepted, 423(3) may be unnecessary.

45. 423(4) should be amended according to your item no. 29, and to substitute "the Administrator determines" for "extraordinary circumstances indicate."

46. 423(5) should include after "Agency cover" the phrase "or of an organization or individual cooperating with the Agency...."

47. 423(6) should provide:

to maintain liaison relationships with, and furnish or receive technical guidance or training to or from, other departments and agencies, and state and local entities under 42 U.S.C. 4221, et seq.

48. Section 424 should have added at its end this sentence: "The Agency is authorized to process and provide for the relocation of such individuals as necessary and appropriate."

49. Unless has changed his opinion, 425(a) should be amended by deleting from its first sentence "lawful functions of the Agency" and inserting instead:

functions authorized by this Act and for activities of an extraordinary or emergency nature not otherwise authorized by this Act when such expenditures are approved in advance by the Administrator.

I see no need to require DNI approval as in your item no. 31. This also treats your item no. 30.

50. 425(b) should be revised by deleting "but such expenditures shall be made only for activities authorized by law." I see no difficulty with the concept, suggested in your item no. 32, that the DNI and the "Administrator" of CIA should each report independently as to the unvouchered expenditures authorized by each, or by the same individual in each function. As your suggested language accomplishes, however, it would be preferable to report only to the intelligence committees.

51. The "Administrator" of CIA, since given unvouchered funds authority parallels to that of the DNI, also should have in a new subsection under 425 the audit waiver authority given the DNI in 123(e). Otherwise the unvouchered funds authority is meaningless for Agency purposes and all waivers will have to be obtained from the DNI who may become a remote figure, in terms of both interest and access.

52. Your items nos. 33 and 34 clarifications of 425(c)(1)(A) and (b) appear necessary. The last phrase "and the activities to be funded are authorized by law" should be deleted from 425(c)(1)(C).

53. As you suggest in your item no. 36, the General Counsel and IG should both be charged in 426(a) and (b) with servicing the Office of the DNI and the DNI as well as the Agency and the "Administrator." The words "and inspect" should be added after "investigate" in 426(b)(1). Whether the General Counsel should be approved by the Senate, your item no. 35, does not seem to me to be a valid issue, especially since lack of such approval apparently is the exception, not the rule, and the DNI, DDNI and all the ADNIs will be so approved.

54. Your item no. 37 is correct as to 431(a). Do we know what gave rise to this provision?

55. Section 716 under 431(b)(1) should be revised as follows:

... or any colorable imitation of such name, initials, or seal in connection with any commercial enterprise in a manner which conveys the impression that such use is approved, endorsed, or authorized by the Agency, including any advertisement, merchandise, book, circular, pamphlet, or other publication or production, shall be fined....

This is your item no. 38.

56. The title of the Section 2392 proposed in 431(c)(1) should be amended to read "Unauthorized Disclosure of Identity of Persons Under Cover." There should be added after "as an officer or employee of the U. S." the phrase "or while acting as a contractor, or as an employee of a contractor, of the U. S." Your item no. 39, while it has merit, is probably not acceptable as is. Perhaps a reasonable alternative or "fall-back" is to propose a new subsection (b) concerning loss of usefulness or damage to career, but with a somewhat lesser penalty than is available for endangering such a person, i.e., \$25,000 and three years. You must recognize that such an offense, even as to endangering safety, will be a very difficult one to prove without further damage to the interests of the U. S.

57. Your item no. 40 does not appear to be a real issue since 432(b) ends with the words "except to the extent expressly authorized by this Act."

58. The 5 U.S.C. 5921(3) definition of "employee" cited in your item no. 41 is preferable for 441(a)(1).

59. In addition to the changes suggested in your item no. 42, 441(b)(2) should include at its end "unless the Administrator determines that it is necessary to provide further benefits in order to accomplish the Agency's functions abroad."

60. Your item no. 43 relates to an argument which we should make at every opportunity concerning each instance in the legislation where items are required to be submitted to the Congress any time prior to their effective date. This must be unconstitutional, and I hope to do some research on this issue, and a violation of Section 7 of Article I which requires Congress to present legislation to the President and allows a veto power. These prior submission requirements allow Congress a second opportunity to legislate after the bill becomes law, especially where the qualifier "but the foregoing provision shall not constitute a condition precedent ..." is not included.

61. 441(d)(1) should have added at its end: "And also, under unusual circumstances, the Administrator may grant special quarters, cost of living, post and representational allowances, in addition to, or in lieu of those expenses, benefits and allowances." This is your item no. 44 and if accomplished would remove the need for the suggestion in paragraph 59 above.

62. As you suggest in your item no. 45, 442 should be deleted. At a minimum, however, it should end after "(78 Stat. 1043; 50 U.S.C. 403 note)." If the section remains as is, "because of security considerations" should be added after "(2) so specialized."

63. 451(a) should provide, instead of "to the Director," "to the Agency, except such personnel, obligations, contracts, property, and records which the DNI determines should be transferred to the Office of the DNI."



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